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Error to Circuit Court, Norfolk County.

Petition by John T. Duke and others against the Board of Supervisors of Norfolk County and others to have territory incorporated as a town. Order granting the petition, and defendants bring error. Reversed, and petition dismissed.

*Sale, Mann & Tyler, J. W. Happer, and T. J. Wool*, for plaintiffs in error.

*Jno. N. Sebrell, Jr.*, for defendants in error.

ARMINIUS CHEMICAL CO. et al. v. LANDRUM et al.

Jan. 18, 1912.

[73 S. E. 459.]

**1. Judgment (§ 251\*)—Applicability to Pleadings.**—Plaintiffs' amended declaration sought to recover for injury to land by an alleged nuisance committed and maintained by defendants prior to the commencement of the action, consisting of the pollution of a water course by which plaintiffs' lands were subject to a deposit of iron pyrites and sulphurous substances from defendants' mines. Defendants' plea charged that any nuisance was permanent in character, and that all damages therefrom must be recovered in one action, and concluded with an averment that plaintiffs ought not to maintain a claim for temporary damages. Another plea raised the same question, and concluded that the cause of action pleaded did not accrue within five years before suit. The replication to both pleas was general. The jury found defendants guilty of the trespass alleged in the declaration and that plaintiffs had been damaged to the extent of \$800. Held, that such verdict constituted an adverse finding on defendants' pleas and that a judgment for plaintiffs on such verdict was not objectionable as in conflict with the declaration and replication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.\* 8 Va.-W. Va. Enc. Dig. 296.]

**2. Waters and Water Courses (§ 76\*)—Pollution of Stream—Damages—Mitigation—General Benefits.**—In an action against upper riparian mine owners for the pollution of a stream by the waste from their mines which flowed down on and injured plaintiffs' lands, evidence of general benefits accruing to plaintiffs' lands, in common with all the land in the vicinity arising from the fact that operation of defendants' mines caused an increase in the population, was admissible in mitigation of damages.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 64; Dec. Dig. § 76.\* 4 Va.-W. Va. Enc. Dig. 210.]

**3. Appeal and Error (§ 1040\*)—Harmless Error—Rejection of Special Plea—General Issue.**—Defendants in trespass were not prej-

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

udiced by the rejection of a special plea alleging that the injuries complained of in the declaration were but the result of the natural, lawful, and reasonable use of their property by the defendants without malice or negligence, all the evidence admissible under such plea being equally admissible under the plea of not guilty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4094; Dec. Dig. 1040.\* 1 Va.-W. Va. Enc. Dig. 588. 11 Va.-W. Va. Enc. Dig. 258.]

**4. Waters and Water Courses (§ 64\*)—Pollution—Riparian Proprietors—Rights.**—All riparian proprietors on the same stream have the same right to the use and enjoyment of its waters, the rights of each being qualified by the right of the others to have the stream substantially preserved in its size and flow, and to be protected against any material pollution of its waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 55-57; Dec. Dig. § 64.\* 13 Va.-W. Va. Enc. Dig. 678, 683.]

**5. Waters and Water Courses (§ 67\*)—Riparian Proprietors—Pollution—Mineowners.**—The fact that defendants owned mines located on the stream on which plaintiffs were lower riparian proprietors, and that such mines were so situated that in their operation the pollution of the stream was a necessary consequence, did not prevent plaintiffs from recovering damages to their lower riparian land by such pollution, since the necessities of one man's business cannot be made the standard by which to measure another's right in a thing belonging to both.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 58; Dec. Dig. § 67;\* Mines and Minerals, Cent. Dig. §§ 245, 246. 13 Va.-W. Va. Enc. Dig. 679.]

**6. Eminent Domain (§ 69\*)—Use of Property—Injury to Others.**—The private business of one man or class of men, however important its successful operation may be to the public or to the development of the country, does not give him or them the right to destroy or materially injure the property of another in a thing in which they have a common right, under the constitutional provision that private property cannot be taken or damaged for public use without compensation, and for the same reason cannot be damaged for private purposes without rendering the person causing the damages liable therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 171-179; Dec. Dig. § 69.\* 5 Va.-W. Va. Enc. Dig. 77.]

**7. Waters and Water Courses (§ 77\*)—Pollution—Contributory Negligence—Question for Jury.**—In an action for damages to a lower riparian proprietor by the pollution of a water course, whether plaintiffs had been guilty of contributory negligence in failing to take cer-

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

tain fallen trees out of the stream so as to minimize the overflow thereof, held for the jury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 77.\* 10 Va.-W. Va. Enc. Dig. 419.]

**8. Evidence (§ 542\*)—Experts—Competency.**—Where a witness was a scientific and practical engineer of long experience and a member of the American Society of Mining Engineers, had been a city engineer, and had had experience in filtering and cleansing water for drinking purposes, it was not reversible error for the court to permit him to testify on the question, whether it was possible to operate certain iron pyrite mines without polluting the waters of a creek, though he did not claim to be a mining engineer and had had no experience in filtering or purifying waters from mines.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2355; Dec. Dig. § 542.\* 5 Va.-W. Va. Enc. Dig. 777, 784.]

**9. Appeal and Error (§ 1048)—Harmless Error—Competency of Witnesses.**—Where upper riparian proprietors in the operation of mines had no right at all to pollute the waters of a creek to the injury of a lower riparian proprietor, they were not prejudiced by a ruling permitting an alleged incompetent witness to testify that the mines could be operated without polluting the stream.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1048.\* 1 Va.-W. Va. Enc. Dig. 592.]

**10. Appeal and Error (§ 215)—Instructions—Right to Allege Error—Necessity of Objections.**—Where in an action against several upper riparian proprietors for polluting the stream to the damage of lower proprietors, defendants did not except to an instruction that if it was possible to determine from the evidence what specific amount of damage had been caused by any one of the defendants, the jury should assess such defendant the amount for which it was responsible, but if it was impossible to determine in what proportion the defendants had contributed to injuries, then each who had contributed in any degree was responsible for the whole injury, though his act alone might not have caused the entire damage, and though without fault on his part the damages would have resulted from the acts of the other defendants, could not object for the first time on appeal on the ground that each defendant having acted independently, each was liable only for the damage done by its acts and not for the result of the acts of others.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.\* 1 Va.-W. Va. Enc. Dig. 563.]

**11. Appeal and Error (§ 1001)—Evidence—Review.**—A judgment will not be reversed because the verdict is contrary to the evidence or without evidence to support it, except in a case of plain deviation

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from or palpable insufficiency of evidence and not in a doubtful case merely because the court, if sitting as a jury, would have given a different verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\* 10 Va.-W. Va. Enc. Dig. 457.]

Error to Circuit Court, Louisa County.

Trespass by E. Landrum and others against the Virginia Carolina Chemical Company and others. From a judgment against defendants, the Sulphur Mining & Railroad Company and the Arminius Chemical Company, they bring error. Affirmed.

WHITTLE, J., absent.

*F. W. Sims, Gordon & Gordon, and Jas. R. Caton*, for plaintiffs in error.

*W. C. Bibb and Harmon & Walsh*, for defendants in error.

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DAVIS *v.* DAVIS.

Nov. 16, 1911.

[73 S. E. 946.]

**1. Indictment and Information (§ 15\*)—Former Indictment.—**

Where one or more counts in an indictment state offenses not embraced in indictments previously dismissed, though provable by evidence which would have been admissible under the dismissed indictments, the prisoner cannot be discharged on habeas corpus, but must be remanded for trial.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 15.\* 7 Va.-W. Va. Enc. Dig. 385.]

**2. Indictment and Information (§ 132\*)—Election between Counts.**

—Where one or more counts in an indictment state offenses not embraced in dismissed indictments, but provable by evidence which would have been admissible under the dismissed indictments, it is proper practice, when the prisoner is brought to trial, to require the attorney for the commonwealth to state upon what counts he relies as setting forth offenses not embraced in the dismissed indictments.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 132.\* 7 Va.-W. Va. Enc. Dig. 385.]

Application by Charles Hall Davis for writ of habeas corpus to Arthur Kyle Davis. Denied.

*George S. Bernard, John L. Lee, James Mann, and Charles T. Lassiter*, for petitioner.

*Samuel W. Williams*, Atty. Gen., and *Richard H. Mann*, for respondent.

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.